UNITED MALAYAN BANKING CORPORATION BHD.

v.

ALUMINEX (M) SDN. BHD. (RECEIVERS AND MANAGERS APPOINTED) & ANOR.

SUPREME COURT, KUALA LUMPUR
TAN SRI DATO' HAJI MOHD AZMI BIN DATO' HAJI KAMARUDDIN,
DATO' PEH SWEE CHIN,
TAN SRI DATUK EDGAR JOSEPH JR. SCJJ
[CIVIL APPEAL NO. 02-169-91]
15 MAY 1993

COMPANY LAW: Debentures - Absolute assignment - Priorities - Whether any difference if there is notice of debenture - Absence of title retention clause - Contest between holder of a charge and holder of a purchase money security interest.

On 29 March 1982, in consideration of the 2nd respondent (UAB) granting the 1st respondent (Aluminex) overdraft facilities, Aluminex issued to UAB a debenture creating a floating charge over all its property, present and future, the debenture specifically providing that Aluminex was not to be at liberty to create, save with the written consent of UAB, any other mortgage, debenture, (whether fixed or floating), charge, pledge or lien ranking in priority to or *pari passu* with the debenture. The debenture was lodged and registered at the Registry of Companies on 13 September 1982. Again, on 21 March 1984 another debenture was created on the same terms and was registered on 23 May 1984.

On 18 April 1986 Aluminex was appointed as a sub-contractor for the design, supply and installation of a glass curtain walling and frameless glazed screen. To carry out this contract Aluminex entered into a Contract of Sale and Purchase with Ming Sing Glass Sdn. Bhd. for the supply of glass. To get that glass Ming Sing had to rely on Korean suppliers. Ming Sing applied to the appellant (UMBC) for a loan to enable it to pay its Korean suppliers. UMBC granted the loan, on condition that Ming Sing had to issue trust receipts in favour of it. In addition Aluminex had to assign in favour of UMBC the sub-contract awarded to it and the proceeds payable thereunder, and in furtherance thereof Aluminex was to open a collection account with them. The assignment was an absolute assignment.

As at 24 September 1987 the amounts due and owing by Aluminex to UAB, were such as to cause UAB to appoint, on that date, receivers and managers under the debentures thereby causing them to crystallize. The receivers and managers became aware of the assignment in favour of UMBC and a sum of RM285,811.88 payable to Aluminex as progress payments. As a result, a dispute between UAB and UMBC relating to the respective priorities of the charges created by the two debentures issued in favour of UAB and the charge created by assignment issued in favour of UMBC, erupted.

Held:

[1] In a contest between the holder of a charge over after acquired property and the holder of a purchase money security interest taken to secure the price of an asset falling within the ambit of class defined by the after acquired property clause, the merits would appear to lie with the holder of the purchase money security interest; after all, it was he who provided the necessary financial assistance required to purchase the after acquired property and it would appear to be neither right nor fair that the holder of the charge over after acquired property could now, as it were, scoop up the asset or its proceeds to the exclusion of his opponent.

[2] The glass acquired by Aluminex was subject *ab initio* to UMBC's security interest constituted by the assignment and the only interest Aluminex had acquired was the right to acquire beneficial ownership to accompany its legal ownership of the glass upon payment of the full purchase price to UMBC. The absence of a retention of title clause in the assignment is therefore irrelevant especially since the assignment was a security for the advance of money for the purchase of the glass.

[3] There is nothing abnormal in sub-contractors in the construction field assigning the proceeds of work done as a mode of payment for the supply of raw materials and indeed it is common for them to do so. Therefore in issuing the assignment before the crystallization of the debentures without the consent of UAB, Aluminex was acting well within the license or power conferred upon it by the debentures.

[4] Notice of a debenture creating a floating charge does not constitute notice of the terms thereof including restrictive clauses forbidding the creation of latter charges ranking in priority

to or *pari passu* with the charge containing the clause.

[5] There was never any absolute sale of the glass to Aluminex who thus took the glass subject to the rights of UMBC and all that Aluminex acquired was an interest in the equity of redemption. Therefore the debenture holder UAB being in the position of an equitable assignee cannot be in a better position than the assignor Aluminex.

[Appeal allowed with costs].

[Bahasa Malaysia Translation of Headnote]

UNDANG-UNDANG SYARIKAT: Debentur - Penyerahhakkan mutlak - Keutamaan - Samada sebarang perbezaan jika terdapat notis debentur - Ketiadaan klausa simpanan hakmilik - Pertikaian diantara pemegang caj dan pemegang kepentingan sekuriti wang pembeli.

Pada 29 Mac 1982, sebagai balasan kepada responden kedua (UAB) yang memberikan kemudahan overdraf kepada responden pertama (Aluminex), Aluminex telah memberikan kepada UAB satu debentur mewujudkan caj terapung ke atas segala harta semasanya dan harta di masa hadapan, debentur tersebut dengan khususnya memperuntukkan bahawa Aluminex tidak bebas untuk mewujudkan, kecuali dengan kebenaran bertulis daripada UAB, apa-apa gadai-janji lain, debentur, (sama ada tetap atau terapung), gadaian, sandaran atau lien yang sama keutamaannya dengan atau *pari passu* dengan debentur tersebut. Debentur tersebut telah diserahsimpan dan didaftarkan di Pejabat Pendaftaran Syarikat pada 13 September 1982. Sekali lagi, pada 21 Mac 1984 satu lagi debentur telah diwujudkan atas terma-terma yang sama dan didaftarkan pada 23 Mei 1984.

Pada 18 April 1986 Aluminex telah dilantik sebagai sub-kontraktor untuk merekabentuk, membekalkan dan memasang dinding kaca dan skrin kaca tak berangka. Bagi menjalankan kontrak ini Aluminex telah menandatangani surat Perjanjian Jual-Beli dengan Ming Sing Glass Sdn. Bhd. bagi pembekalan kaca. Untuk mendapatkan kaca tersebut Ming Sing terpaksa bergantung kepada pembekal-pembekal dari Korea. Ming Singh memohon kepada perayu (UMBC) untuk suatu pinjaman bagi membolehkannya membuat bayaran kepada pembekal-pembekal dari Korea. UMBC memberikan pinjaman tersebut, dengan syarat Ming Sing harus mengeluarkan penerimaan amanah yang memihak kepadanya. Sebagai tambahan Aluminex harus menyerahhak, bagi memihak kepada UMBC, sub-kontrak yang diawardkan kepadanya dan hasil-hasil yang patut dibayar di bawahnya itu, dan selanjutnya Aluminex hendaklah membuka satu akaun pengumpulan dengan mereka. Penyerahhakkan tersebut ialah penyerahhakkan mutlak.

Sebagaimana pada 24 September 1987, jumlah wang yang terhutang dan patut dijelaskan oleh Aluminex kepada UAB, adalah yang sedemikian sehingga menyebabkan UAB melantik, pada tarikh tersebut, penerima dan pengurus di bawah debentur-debentur tersebut dan menyebabkan mereka sebagai membeku. Penerima dan pengurus menyedari akan penyerahhakkan yang memihak kepada UMBC dan wang berjumlah RM285,811.88 yang kena dibayar kepada Aluminex sebagai pembayaran berperingkat. Akibatnya wujudlah pertikaian diantara UAB dan UMBC berkaitan dengan harta-harta dalam gadaian-gadaian yang diwujudkan oleh kedua-dua debentur tersebut yang diberikan memihak kepada UAB dan gadaian melalui penyerahhakan yang dikeluarkan memihak kepada UMBC.

Diputuskan:

[1] Dalam pertikaian diantara pemegang caj ke atas harta yang diperolehi selepas dan pemegang kepentingan sekuriti wang pembeli yang diambil bagi mendapatkan harga suatu aset yang tergolong dalam lingkungan kelas yang ditetapkan oleh klausa harta yang diambil selepas, meritnya tidak akan sama dengan pemegang kepentingan sekuriti wang pembeli; kerana dialah yang memberikan bantuan kewangan yang dikehendaki untuk membeli harta yang diperolehi selepas dan nampaknya ia tidak adil atau betul bahawa pemegang caj harta yang diperolehi selepas, dapat sekarang ini, sebagaimana adanya, mengambil aset atau hasilnya dan mengecualikan penentangnya.

[2] Kaca yang diperolehi oleh Aluminex adalah tertakluk *ab initio* kepada kepentingan sekuriti UMBC yang dibentuk oleh penyerahhakkan tersebut dan satu-satunya kepentingan yang diperolehi oleh Aluminex ialah mendapatkan keempunyaan benefisial bagi mengiringi keempunyaan gelasnya yang sah atas pembayaran penuh akan harga belian kepada UMBC. Maka, ketiadaan klausa simpanan hakmilik dalam penyerahhakkan tersebut

adalah tidak relevan terutamanya apabila penyerahhakkan tersebut merupakan suatu sekuriti bagi wang yang didahulukan bagi pembelian kaca berkenaan.

[3] Tiada apa yang luarbiasa dengan sub-kontraktor dalam sektor pembinaan menyerahkan hasil kerja yang telah dilakukan sebagai bentuk pembayaran bagi bekalan bahan mentah dan adalah biasa bagi mereka untuk berbuat sedemikian. Oleh yang demikian, dalam memberikan penyerahhakkan sebelum pembekuan debentur-debentur tersebut tanpa kebenaran UAB, Aluminex masih lagi bertindak dalam lingkungan lesen atau kuasa yang diberikan kepadanya oleh debentur-debentur tersebut.

[4] Notis debentur mewujudkan gadaian terapung tidak membuatkan notis terma-terma tersebut termasuklah klausa terhad menghalang perwujudan gadain-gadain yang kemudian yang sama keutamaannya dengan atau *pari passu* dengan gadaian yang mengandungi klausa tersebut.

[5] Tiada sebarang jualan mutlak akan kaca kepada Aluminex yang dengan itu mengambil kaca berkenaan tertakluk kepada hak-hak UMBC dan apa yang Aluminex perolehi ialah kepentingan dalam ekuiti penebusan. Oleh yang demikian, pemegang debentur yang berada dalam kedudukan sebagai pemegang serah hak secara ekuiti tidak berada dalam kedudukan yang lebih daripada penyerah hak Aluminex.

[Rayuan dibenarkan dengan kos].

Cases referred to:

Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen [1976] 1 WLR 989 ***(cit)***
Wilson v. Kelland [1910] 2 Ch. 306 ***(cit)***
Re Connolly Bros. Ltd. (No. 2) [1912] 2 Ch. 25 ***(cit)***
Security Trust Co. v. Royal Bank of Canada [1976] AC 503 ***(cit)***
Church of England Building Society v. Piskor [1954] 1 Ch. 553 ***(cit)***
Reynold Brothers (Motor) Pty. Ltd. v. Esanda Ltd. [1983] 1 ACLC 1333 ***(cit)***
Clough Mill Ltd. v. Martin [1984] 3 AER 982 at 989 g ***(not foll)***
Rother Iron Works Ltd. v. Cantebury Precision Engineers Ltd. [1974] QB 1 ***(cit)***
N.W. Robie & Co. Ltd. v. Whitney Warehouse Co. Ltd. [1963] 1 WLR 1324 ***(cit)***
George Barker (Transport) Ltd. v. Eynon [1974] 1 WLR 462 ***(cit)***
English and Scottish Mercantile Investment Co. v. Brunton [1892] 2 QB 700 ***(cit)***
Re Castel and Brown Ltd. [1898] 1 Ch 315 ***(cit)***
Re Vallertort Sanitary Steam Laundry Co., [1903] 2 Ch. 654 ***(cit)***
G & T Earle Ltd. v. Hemsworth RDC [1928] 44 TLR 605 ***(cit)***
Matheson v. Wahlen [1928] SR (NSW) 189 at p. 194 ***(foll)***
Re Bunbury Foods Pty. Ltd. [1984] 2 ACLC 639 ***(cit)***
Shipley v. Marshall [1863] 14 CB (NS) 566 ***(cit)***
Independent Automatic Sales Ltd. v. Knowles Fosterd [1962] 3 AER 27 ***(cit)***

Legislation referred to:

Civil Law Act 1956, s. 4(3)
Companies Act 1965, s. 108(3)(d)
Companies Regulations 1966, Schedule 2, Form 34
Evidence Act 1950, s. 92
Uniform Commercial Code, s. 9 - 107 (USA)

For the appellant - Sharmini Navaratnam; M/s. Rashid & Lee
For the respondent - K. Ananthan; M/s. Skrine & Co.

JUDGMENT

Edgar Joseph Jr. SCJ:

The issue of central importance to this appeal concerns the resolution of a priority dispute between two banks.

The history of the matter concerning the two competing securities which calls for the consideration of this Court may be stated thus:

On 29 March 1982, in consideration of the second respondent the United Asian Bank Berhad ("UAB"), granting to the first respondent Aluminex (M) Sdn. Bhd. ("Aluminex") overdraft facilities, Aluminex had issued to UAB a debenture ("the Debenture") creating a floating charge over all its property, present and future, the debenture specifically providing that Aluminex was not to be at liberty to create, save with the written consent of UAB, any other mortgage, debenture (whether fixed or floating), charge, pledge or lien ranking in priority to or *pari passu* to the debenture. The debenture was lodged and registered at the Registry of Companies, Kuala Lumpur, on 13 September 1982 pursuant to s. 108 of the Companies Act 1965.

Again, on 21 March 1984, in consideration of UAB increasing the limit of the overdraft facilities, Aluminex had issued to UAB a second debenture, ("the Supplemental Debenture") creating a floating charge over all its property present and future, this debenture also providing that Aluminex was not to be at liberty to create, save with the written consent of UAB,

any other mortgage, debenture etc. ranking in priority to or *pari passu* to the debenture. The supplemental debenture was lodged and registered at the Registry of Companies, Kuala Lumpur, on 23 May 1984, pursuant to s. 108 of the Companies Act 1965.

For brevity and convenience, we shall, where the context so requires, when referring to the debenture and the supplemental debenture collectively, refer to them as "the debentures".

Now, in 1986, the second and the third defendants Takenaka Komuten Co. Ltd. and Pembinaan Maluri Sdn. Bhd., respectively, in the Court below, but who are not parties to this appeal, were jointly the main contractors under a building contract for the construction of the headquarters building for Bank Pembangunan Malaysia Bhd., and had, on 18 April 1986, appointed Aluminex as the sub-contractor for the design, supply and installation of a glass curtain walling and frameless glazed screen, for that building. This sub-contract ("the Sub-Contract") was worth precisely RM4,688,177.

To carry out its obligations under the sub-contract, Aluminex entered into a contract of sale and purchase ("the Contract of Sale") with Ming Sing Glass Sdn. Bhd. ("Ming Sing") for the supply of glass. The contract of sale was worth precisely RM2,300,000. But, to get that glass, Ming Sing had to rely on Korean suppliers. So, Ming Sing applied to the first respondent United Malayan Banking Corporation ("UMBC") for a loan to enable it to pay its Korean suppliers.

By their letter of offer dated 15 September 1986 addressed to Ming Sing ("the Facility Letter"), UMBC had offered to grant to Ming Sing the financial assistance they sought, the facilities to be granted being described as a "Letter of Credit/Trust Receipt (L/CTR)" facility, on certain terms, which included the following:

Security:	The above facility is to be secured against assignment of the proceeds of the sub-contract awarded to Aluminex (M) Sdn. Bhd. ('Aluminex') valued at RM4,688,177 in favour of our bank. Aluminex is to open a collection account with us for this purpose.
Other terms and conditions:	Please take note that your are to obtain a letter or undertaking from the principal contractor, Takenaka Maluri Joint Venture to pay the proceeds of the contract directly to Aluminex (M) Sdn. Bhd.'s Collection account with us. The portion of the monies paid in respect of work done by your company, that is, 50% of the proceeds of the sub-contract awarded to Aluminex (M) Sdn. Bhd. is to be used to settle the above Letter of Credit/Trust Receipt facility.

Pursuant to the facility letter, Ming Sing issued trust receipts in favour of UMBC by the terms of which they deemed to hold the glass in trust for UMBC but they were allowed to sell the glass on condition that they received and retained the proceeds of sale as trustees for UMBC and they had also to keep such proceeds separate and apart from their other monies and then to promptly pay them over to UMBC. It was further provided in each of the trust receipts that UMBC was the owner of the glass and that in effecting the sale of the glass Ming Sing would be acting as agents for UMBC; this was, of course, a provision which was merely declaratory of the effect, in law, of the issue of a trust receipt.

That, however, was not the end of the matter, because, in addition, UMBC required, an additional security, for granting the loan to Ming Sing, and this was to take the form of an assignment in their favour by Aluminex of the sub-contract awarded to Aluminex and the proceeds payable thereunder, and in furtherance thereof, Aluminex was to open a collection account with them.

Consequently, on 16 October 1986, Aluminex executed a document described as a loan agreement cum assignment, being Ex. A - 4 to En 2, ("the Assignment"). In the three recitals of the assignment mention was made by way of introductory, of the relationship between the parties thereto, that is to say, Aluminex as Assignor, UMBC as assignee and Ming Sing as borrower; that Aluminex had been awarded the sub-contract, that Aluminex had requested UMBC to grant to Ming Sing Letter of Credit/Trust Receipt facilities up to a limit of RM2.3 million upon the security of an assignment of the sub-contract and all monies which may then or hereafter become payable to Aluminex and all benefits and advantages therein created upon the terms therein set forth.

It was provided in the body of the assignment that for the consideration aforesaid, Aluminex "absolutely assigns unto UMBC the sub-contract and all monies which may now or hereafter become due and payable to (Aluminex) pursuant to and under the (Sub-Contract) and all benefits, rights and advantages therein and all arrangements and all certificates and documents ... which may be necessary to enable the UMBC to recover all the above said moneys or any installments or part thereof". (Clause 2).

The effect of the assignment was to continue to remain in full force and effect until the UMBC had been fully paid all monies owing to it by Ming Sing under the facility.

It was further provided that Aluminex and/or Ming Sing expressly undertook to furnish UMBC with copies of all progress payment claims showing the various stage of completion of the sub-contract and all monies as and when they became due and payable to Aluminex under the sub-contract. (Clause 9).

It was also provided that the assignment was expressly intended to be a continuing security for all moneys owing to UMBC by Ming Sing (Clause 11).

It was lastly provided that the assignment was to be binding upon the liquidators, receivers, assignees and successors in title of the parties. (Clause 31).

The assignment was registered as a charge by Aluminex with the Registry of Companies, Kuala Lumpur, on 12 November 1986 pursuant to s. 108 of the Companies Act.

At this point, we would interject to observe, that it was not disputed, either before us or in the Court below, that the assignment was an absolute assignment within the meaning of s. 4(3) of the Civil Law Act 1956. Accordingly, this judgment is written on the basis that the assignment was as absolute assignment within the meaning of s. 4(3).

To resume the narrative of events, UMBC went further in its quest for security and also obtained from the main contractors aforesaid a letter of undertaking dated 2 October 1986 ("the Letter of Undertaking") addressed to the Manager of UMBC, which confirmed that they had no objection to Aluminex executing the assignment in their favour and undertaking "to remit all monies and payments due under the sub-contract directly to UMBC and that all cheques representing the same would be paid into Aluminex's 'collection account' with UMBC".

In the upshot, UMBC provided the facility to Ming Sing, the Korean suppliers then delivered the glass to Ming Sing which in turn delivered the same to Aluminex which utilised it in fulfillment of its obligations under the sub-contract with the main contracts to design, supply and instal the glass curtain walling and frameless glazed screens for the headquarters building of Bank Pembangunan Malaysia Bhd. But, Ming Sing had never been paid for the glass.

In the events which transpired, as at 24 September 1987, the amounts due and owing by Aluminex to UAB, were such as to cause UAB to appoint, on that date, receivers and managers under the debentures thereby causing them to crystallize. The attention of the receivers and managers was then drawn to the fact that pursuant to the Letter of Undertaking issued by the main contractors and the assignment issued by Aluminex, both in favour of UMBC, a sum of RM285,811.88 payable to Aluminex as progress payments under Progress Payment Certificate Nos. 34 and 35 issued under the sub-contract, had been paid to UMBC who in turn had paid the same into an account specially ear marked for this purpose, and designated under the Letter of Undertaking as "United Malayan Banking Corporation Bhd. for account of Aluminex (M) Sdn. Bhd. - A/C No. 0235105268".

It was at this point that the dispute between the second respondent UAB and the appellant UMBC relating to the respective priorities of the charges created by the two debentures issued in favour of UAB and the charge created by the assignment issued in favour of UMBC, erupted. And so, it was agreed, by both UAB and UMBC that the amount at stake, to wit, the sum of RM285,811.88, be placed on fixed deposit with UMBC and there to be held until determination of an originating summons taken out by the Receivers and Managers of Aluminex (the first respondent which was the first plaintiff in the Court below) and UAB (the second respondent which was the second plaintiff in the Court below) citing UMBC (the Appellant), Takenaka Co. Ltd. and Pembinaan Maluri Sdn. Bhd., as the first, the second and the third defendants, respectively.

The reliefs sought by the originating summons were these:

(i) That there be a declaration that the 1st defendant be deemed to have notice of the contents of the deed of debenture dated 29 March 1982 made between the plaintiff and the United Asian Bank Bhd., in particular clause 9(b), 14 and/or 18 thereof by virtue of the registration and lodgement of a copy of the said debenture with the Registrar of Companies;

(ii) That the 1st defendant be deemed to have notice of the contents of the supplemental debenture dated 21 March 1984 between the plaintiff and United Asian Bank Bhd., in particular clauses 9(c), 14 and/or 18 thereof by virtue of the registration and lodgement of a copy of the said supplemental debenture with the Registrar of Companies;

(iii) That the interest of the 1st defendant in the assignment of the moneys, benefits and advantages in the sub-contract dated 18 April 1986 between the plaintiff and the 2nd and 3rd defendants pursuant to the loan agreement cum assignment dated 16 October 1986 between the plaintiff and the 1st defendant be subject to the interest of the said United Asian Bank Berhad as contained in the said deed of debenture and the said supplemental debenture;

(iv) That the sum of RM285,811.88 now placed by the 1st defendant in a fixed deposit account be released to the plaintiff forthwith;

(v) That all interest accrued on the said sum of RM285,811.88 also be for the account of the plaintiff and be also released to the plaintiff forthwith;

(vi) That the balance sum of RM290,283.20 due on 31 July 1988 under the sub-contract dated 18 April 1986 between the plaintiff and the 2nd and 3rd defendants be paid by the 2nd and 3rd defendants to the plaintiff forthwith together with all other sums as may have become due under the said sub-contract;

(vii) That the costs of this application be paid by the defendants to the plaintiff, such costs to be borne by the defendants in equal proportions.

The learned Judge (V.C. George J.) having recited the sequence of the above financial transactions, concluded that:

> In the face of the debentures with particular reference to clauses 9(b) and 18 in the first and the equipolent clauses in the second, Aluminex could not properly assign its interest in the sub-contract without the written consent of UAB and because UMBC is deemed to have had notice of the debentures and of those clauses in particular, they have to get behind UAB in the quene.

In the event the learned Judge determined the priority dispute in favour of UAB and made the further orders consequential thereto and from that judgement, UMBC has appealed to this Court.

Broadly stated, the question which arises for decision in this appeal is whether the learned Judge was right in so holding.

Before us, the submissions of Counsel for UMBC were twofold; and in summary, they were as follows:

(1) UMBC was entitled to priority since the glass was at all material times subject to an equitable charge in its favour; and

(2) alternatively, the assignment amounted to a subsequent fixed charge in respect of the book debts of Aluminex which take priority over the floating charge of UAB since the floating charge had not crystallized at the date of the assignment and UMBC did not have express notice of the restrictions in the debenture and the supplemental debenture.

In amplification, Counsel for UMBC's submission is summarised in a written submission thuswise:

> ... the assignment, in effect, evidences an equitable charge in favour of UMBC in respect of the unpaid purchase price.
>
> The equitable charge is created in respect of the glass.
>
> The glass delivered to Aluminex was never at any one point in time unencumbered. Notwithstanding that legal title in the glass had passed to Aluminex, it was always subject to the equitable charge in favour of UMBC. The debenture can only bite if the glass had passed unencumbered to Aluminex. Here the assignment was entered into before the glass was delivered to Aluminex. Therefore as Professor RM Goode has argued in his article "The After-Acquired Property Clause and the Subsequent Purchase Money Security Interest," in his book "**Legal Problems of Credit Security**" (1982) Edn., the doctrine of *scitilla temporis* is highly unsatisfactory and it is time that English Law got round to upholding the priority of purchase money security interest before exchange of contracts. Here, the purchase money security interest was created before the goods were delivered. The assignment was created before the glass was delivered so it is clear that the glass was never for one moment the unencumbered property of Aluminex and the debenture could not there-

fore give a charge on it. Therefore, it is the appellant's contention that the absence of a retention of title clause is irrelevant in the light of the fact that UMBC obtained an assignment from Aluminex, it being clear that the assignment was a security for the advance of money for the purchase of the glass ...

Alternatively, this case **falls squarely within the example asset in Problem 7** which appears in Prof. R.M. Goode's article "Fixed And Floating Charges, Some Problems of Priority" in his book "**Legal Problems of Credit and Security**" (1982) Edn., (See p. 80 of the reply).

Problem 7

Debtor gives floating charge over book debts to A. Then sell or grants fixed charge over the debts to B.

B wins, unless the charge in favour of A precludes the debtor from granting a subsequent fixed charge ranking in priority to or *pari passu* with A's floating charge and B takes his charge with notice of the restriction on the subsequent charge. For this purpose entry of the restriction on the register does not constitute notice unless B searches the register.

In the instant case the assignment was a fixed charge on the future book debts of Aluminex. There is no evidence that the negative pledge clauses was recorded in the particulars of charge filed with the Registry of Companies. Further, there is no evidence that UMBC had actual knowledge of the negative pledge clauses or that clauses (2)(b), 9(b), 14(f) and (t) and clause 18 were recorded in the particulars of charge filed *via* Form 34. It is pertinent to note that the burden of proof rests with the respondent. Accordingly the Court should hold that UMBC has priority over 50% of the proceeds of the sub-contract.

In responding to the arguments of Counsel for UMBC, that the assignment gave rise to an equitable charge in favour of UMBC as an unpaid seller, Counsel for UAB and Aluminex reminded us of the principles governing priority of charges and these, according to his written submission dated 2 September 1992, were as follows:

(a) A registered charge has priority over a subsequent registered charge (p. 135 of appellant's B.A.).

(b) While a floating charge still floats, the company cannot create a second floating charge over its undertaking ranking before the first even though the debenture creating the first floating charge expressly empowers the company to "deal with its property as it may think fit and, in particular, to mortgage and sell the same or any part thereof" (page 138 of Appellant's B.A.).

Commentary: On the facts of our case, clauses 2(b), 9(b), 14(f) and (t) and clause 18 do not permit the appellant (Aluminex) to even mortgage any of its assets. The appellant (Aluminex) is only allowed to enter into transactions in the ordinary course of business (clause 14(s).

(c) Where the floating charge prohibits the company from creating specific mortgages or floating charges which rank for repayment before the debenture debt, or equally with it, such a provision is **not only an agreement** by the company not to create such mortgages but also an equitable restriction on its power to do so. A later mortgagee who takes a mortgage with notice of the provision will be postponed to the debenture holder - last paragraph of page 138 of Appellant's B.A. On our facts, clause 9(b) read with clause 14(f) and clause 18 clearly prohibit the creation of a charge on any particular asset and the sharing of the income from the sub-contract with the third party.

(d) A restriction in a debenture on the company's power to create later prior ranking mortgages does not affect the priority of a mortgage of property to secure a loan with which the purchase price of the property is paid. This proposition appears as proposition (2) at page 154 of Appellant's B.A.

He then argued that the true issue was whether UMBC had successfully brought itself within the terms of Rule (d). To do so, said Counsel, UMBC would have to demonstrate that the assignment conferred an equitable charge in the glass in favour of UMBC for the balance of the purchase price.

Turning to the facts of the instant case, para 14 of Counsel's written submission dated 2 September 1992 was as follows:

.... UMBC choose not to retain an interest in the glass until the payment of the purchase price but, instead, obtained as security, the assignment of the contract sum. This finding of the Judge at p. 7(F) and p. 8(A-F) AR is not challenged. At no time did UMBC seek to retain an interest in the glass. The trust receipt did not do this and the Judge was not asked to make a finding that the assignment did this. On the contrary, the Judge's finding is that the glass is a fixture belonging to Bank Pembangunan. This finding has also not been challenged.

> In any event, the assignment was not of the proceeds of sale but of the contract sum resulting from the design, supply and installation of the glass by the appellant (Aluminex). Goff LJ in *Clough Mill Ltd. v. Martin* at p. 12 (g to j) of respondents' bundle of authorities said that where there was a mixing of the goods, then, the new product vested in the buyer in the absence of a retention of title clause. The appellant's reliance on the letter of offer dated 15 September 1986 originating from UMBC at p. 55 AR to establish a promise by the 1st respondent (Aluminex) to create a charge is devoid of merit as this letter was not even addressed to the 1st respondent (Aluminex).

Counsel for UAB and Aluminex then concluded that in the ultimate analysis, the only issue in this case was, which of two registered charges should prevail bearing in mind that UMBC concedes that the assignment is a charge. [see s. 108(3)(d) of the Companies Act]. The answer, he said, was that the first in time enjoys priority and on the facts, he urged, that this happens to be UAB. Nor, he added, could UMBC be heard to complain about this because when it took the assignment and registered a charge with the Registry of Companies, Kuala Lumpur, by its own admission it was aware of the prior registered charge.

We must now address the issue of critical substance in this appeal and that is: what were the relative priorities of UAB's charge created by the debenture and the supplemental debenture and UMBC's charge created by the assignment?

We propose to deal with certain key topics which arise on this appeal before determining the priority dispute referred to in the opening paragraph of this judgment.

Was UMBC's advance to Ming Sing, a purchase money advance?

We must begin by identifying the precise nature of the transaction which UMBC, Aluminex and Ming Sing undertook as evidenced by the contemporary documents in the case, to wit, UMBC's facility letter dated 15 September 1986 addressed to Ming Sing, the letter of undertaking dated 2 October 1986 by the main contractors addressed to UMBC, the assignment dated 16 October 1986 the parties to which were Aluminex, UMBC and Ming Sing and the trust receipt 27 January 1987 executed by Ming Sing in favour of UMBC. In doing so, some degree of repetition will be inevitable.

The evidence relevant to the transaction that resulted in the execution of the contemporary documents aforesaid is undisputed.

To recapitulate, that evidence, disclosed Aluminex had issued the floating debentures to UAB which were duly registered, Aluminex then entered into the sub-contract with the main-contractors for "the design, supply and installation of glass curtain walling and frameless glazed screens" for the headquarters building of Bank Pembangunan Malaysia Bhd., and to fulfill its contractual obligations under the sub-contract, Aluminex in turn entered into the contract of sale with Ming Sing for the supply of the required glass, and Ming Sing in turn were relying on Korean suppliers for the glass.

However, Ming Sing not having had the necessary funds for the purchase of the glass had to rely on UMBC for those funds, and this UMBC was willing to provide, subject to compliance with the terms contained in their facility letter dated 15 September 1986. These terms included the execution of the assignment by Aluminex as Assignor, and Ming Sing as borrower, in favour of UMBC as assignee.

The assignment, it will be recalled, was duly registered as a charge with the Registry of Companies, Kuala Lumpur on 12 November 1986, UMBC then provided the financial facility to Ming Sing, the Korean suppliers having been paid by means thereof supplied the glass to Ming Sing and the glass was utilised by Aluminex in fulfillment of its obligations under the sub-contract. Ming Sing, it will be recalled, have not been paid for the glass.

Upon the undisputed facts aforesaid, it is beyond argument that the advance made by UMBC to Ming Sing was intended to be used and was in fact used by Ming Sing to acquire the glass from the Korean suppliers. It was also the means whereby Aluminex obtained delivery of the glass from Ming Sing for purposes of fulfilling its obligations under the sub-contract and without which, Aluminex could not have done so.

Clearly, therefore, the advance by UMBC was a purchase money advance.

Did the assignment create a purchase money security interest?

The term "purchase money security interest" is borrowed from s. 9 - 107 of the American Uniform Commercial Code:

> A security interest is a "purchase money security interest" to the extent that it is ... (b)

> taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

We have already noted when referring to the main provisions of the assignment styled a loan/cum assignment agreement that it was specifically provided, *inter alia*, that the assignment was to remain in full force and effect until the facility in respect of the purchase of the glass had been fully paid. Counsel for UAB has sought to draw a distinction between "the facility" and "the purchase price of the glass", but this overlooks the point that the facility was to finance the purchase of the glass and the Judge had so found on the facts. Without that facility, Aluminex would not have been able to fulfill its obligations under the sub-contract and without the protection of a purchase-money security interest UMBC would not have advanced the facility at all. Undoubtedly, UMBC required the execution of the assignment by Aluminex so as to create a charge since upon delivery of the glass to Aluminex the latter could be legal owner of it and so could reasonably be expected in due course to be entitled to the progress payments due to it upon fulfilling its obligations under the sub-contract.

In our view, the assignment, like any other document must be construed reasonably; it must be construed not only by the words used but also with due regard to the surrounding circumstances, [see s. 92(f) of the Evidence Act 1974 - (Revised)], not forgetting the other contemporary documents.

That was the approach adopted by Lord Wilberforce in *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen* [1976] 1 WLR 989, when he said:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise; it can be illustrated but hardly defined. In a commercial contract it is certainly right that the Court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

And, he continued:

> ... what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were.

Now, although Aluminex had by the assignment, assigned all progress payments due to it under the sub-contract it is obvious upon a reading of the facility letter dated 15 September 1986 from UMBC to Ming Sing (and this we consider should be read together with the assignment, it being part of the surrounding circumstances) that the assignment was to secure repayment by Aluminex of only 50% of the sub-contract sum (RM2.3 million or value of the glass). Be it noted, the facility letter made it clear that only 50% of the sub-contract sum (RM2.3 million or value of the glass) was payable to UMBC through the account opened by Aluminex with UMBC.

So construed, we find that the facility given by UMBC to Ming Sing was in respect of the purchase of the glass from Korea and the assignment had created a security for the purchase of the glass.

What was the nature of the priority dispute in this case?

In our view, having regard to the contents of the contemporary documents and the surrounding circumstances in relation thereto, the priority issue in this appeal involves a prior chargee (UAB) invoking an after acquired property clause and a holder of the purchase money security interest (UMBC).

In a contest between the holder of a charge over after acquired property and the holder of a purchase-money security interest taken to secure the price of an asset falling within the ambit of the class defined by the after acquired property clause, the merits would appear to lie with the holder of the purchase money security interest; after all, it was he who provided the necessary financial assistance required to purchase the after acquired property and it would appear to be neither right nor fair that the holder of the charge over after acquired property could now, as it were, scoop up the asset or its proceeds to the exclusion of his opponent.

But, our research into the authorities shows that neither in England nor in Australia is there any policy for the protection of the holder of the purchase money security interest; instead, the approach adopted by the Courts there in resolving the dispute, is a technical one, everything depending upon whether the equitable rights of the holder of the purchase money security interest be he mortgagee or chargee, under the contract to make the loan advance, attaches to

the property before the borrower company concerned acquires the legal ownership of it on completion of the purchase.

If so, the purchase money security interest attaches to the asset free from encumberences and so the rights which it confers have priority in point of time over the equitable rights of the holder of the prior floating charge created by the debenture notwithstanding a restriction in the debenture on the borrower company's power to create later prior ranking mortgages or charges. This is so whether the mortgage is in favour of the vendor (see *Wilson v. Kelland* [1910] 2 Ch. 306) or a third party (see *Re Connolly Bros. Ltd.* (No. 2) [1912] 2 Ch. 25), and in neither case would the mortgagee or chargee be affected by the restriction even if he knows about it.

In *Re Connolly Brothers (ibid)* what happened was this:

> A company issued debentures to M1 creating a floating charge over all its property, present and future, the debenture providing that the company was not to be at liberty to grant any other mortgage or charge in priority to the debenture. Subsequently, the company applied for a loan to M2 to enable it to purchase certain premises and agreed to give M2 a charge on the property purchased. The Company then entered into a contract to buy the premises, and the purchase was subsequently completed with the advance provided by M2, with whom the title deeds were deposited as security. A memorandum of deposit was subsequently drawn up and executed by the company in favour of M2.

In *Re Connolly* emphasis was placed on the fact that the agreement for security preceded completion of the purchase and it is not clear whether the date of exchange of contracts for purchase of the property was regarded as relevant. But, Cozens-Hardy MR said:

> In my opinion, we should be shutting our eyes to the real transaction if we were to hold that the unincumbered fee simple in the property was ever in the company so that it became subject to the charge of the debenture-holders.

In *Wilson v. Kelland (ibid)*, the purchase price of the new property was not advanced by a third party but was left outstanding by the vendors, who were held to have priority over an earlier debenture because the purchased property had been continuously subject to their equitable lien as unpaid vendors before the execution of a legal mortgage in their favour.

More recently, the case of *Re Connolly Brothers* was followed by the Judicial Committee of the Privy Council in *Security Trust Co. v. Royal Bank of Canada* [1976] AC 503 where a receiver had purchased property on terms that it was mortgaged back to the vendor and the vendor was held to have priority over the debenture holder who had appointed the receiver.

On the other hand, should the purchase-money financier fail to take the precaution of obtaining a binding agreement for a mortgage before completion of the mortgage, there would be an instant of time (*scintilla temporis*) between the acquisition of the new asset by the debtor and the attachment of the subsequent purchase money security interest, so that the charge over after acquired property clamps down at that instant, with the result that the purchase-money financier takes subject to the interest of the holder of the charge over after acquired property. This is well illustrated by *Church of England Building Society v. Piskor* [1954] 1 Ch. 553 where what happened was this:

> the borrowers, on being let into possession of certain premises before completion, purported to grant weekly tenancies. The day the purchase was completed, the premises were charged by way of legal mortgage to a building society. The Court of Appeal held that the assignment and the legal charge could not be regarded as one indivisible transaction: for a moment of time a legal estate in the premises had vested of necessity in the borrowers before they could execute the legal charge, and the estoppel created in favour of the tenants was fed by the legal estate which had vested in the borrowers so that the tenants had priority over the building society.

Lord Evershed MR said at p. 561:

> It is no doubt true to say that in one sense the transaction was one transaction; but it is equally true to say that it consists necessarily of certain defined steps which must take place in a certain defined order, if the result intended is eventually to be achieved. That seems to me not an artificiality, but a necessary result of the law and of the conveyancing practice which was involved.

The determination of the priority issue involving the prior chargee invoking an after-acquired property clause and the holder of the purchase-money security interest must therefore depend upon a minute examination of the sequence of the financing operations. It is this question which we must next consider.

What was the sequence of the financing operations and what was their effect in Law?

The assignment had been created by Aluminex **before** the crystallization of both the debentures, **before** the glass was delivered to Aluminex and, indeed, **before** completion of the purchase of the glass, so that although the legal title in the glass had passed to Aluminex on delivery it was never for one moment the unencumbered property of Aluminex and so was subject to the equitable charge in favour of UMBC. The significance of this in relation to the dispute as to priorities was that the debentures could only "bite" - to use the expression employed by the Judicial Committee of the Privy Council in *Security Trust v. Royal Bank of Canada (ibid)* - if the glass had passed unencumbered to Aluminex, which it had not. In other words, the additional asset acquired by Aluminex - in this case the glass - was subject *ab initio* to UMBC's security interest constituted by the assignment and the only interest Aluminex had acquired was the right to acquire beneficial ownership to accompany its legal ownership of the glass upon payment of the full purchase price to UMBC. The absence of a retention of title clause in the assignment is therefore irrelevant especially since the assignment was a security for the advance of money for the purchase of the glass.

Did the issue of the assignment by Aluminex without the prior consent of UAB contravene clause 14(S) of the debentures?

Another point to note, arising from the fact that the assignment was issued by Aluminex in favour of UMBC before the crystallization of UAB's debenture and supplemental debenture, was that clause 14(S) of both the debentures specifically permitted Aluminex to enter into any transaction with any firm or company in the ordinary course of business, on ordinary commercial terms, without the necessity of having to obtain the consent of UAB.

The question arises whether the issue of the assignment by Aluminex without the consent of UAB was within the license or power given to Aluminex by clause 14(S). There is authority for saying that the expression "ordinary course of business" is not confined to what is in fact ordinarily done in the course of a particular business of the company so that transactions will be within this principle even though, they be, in relation to the company, exceptional or unprecedented. [see e.g. *Reynold Brothers (Motor) Pty. Ltd. v. Esanda Ltd.* [1983] 1 ACLC 1333].

We consider that there is nothing abnormal in sub-contractors in the construction field assigning the proceeds of work done as a mode of payment for the supply of raw materials and indeed it is common for them to do so. In our view, therefore, in issuing the assignment before the crystallization of the debentures without the consent of UAB, Aluminex was acting well within the license or power conferred upon it by the debentures.

Do the principles enunciated by Goff LJ in the case of Clough Mill Ltd. v. Martin assist UAB?

We hasten to add that we have not overlooked Counsel for UAB's submission that, in any event, the assignment was not of the proceeds of sale but of the contract sum resulting from the design, supply and installation of the glass by Aluminex and that when, as here, there was a mixing of the goods then the new product vested in the buyer in the absence of a retention of title clause. In particular, our attention was directed to the following passage in the judgment of Robert Goff, LJ (as he then was) in *Clough Mill Ltd. v. Martin* [1984] 3 AER 982 at 989 g:

> Now it is no doubt true that, where A's material is lawfully used by B to create new goods, whether or not B incorporates other material of his own, the property in the new goods will generally vest in B, at least where the goods are not reducible to the original material. But it is difficult to see why, if the parties agree that the property in the goods shall vest in A, that agreement shall not be given effect to.

But, on the undisputed facts of the instant case, was there a manufacture of a new item or a mixing of goods whereby the new product was vested in Aluminex?

We would repeat that in construing the assignment, no evidence is admissible to contradict or vary its terms except that by reason of proviso (f) to s. 92 of the Evidence Act evidence was admissible to show in what manner the assignment was related to the existing facts. In other words, the assignment would have to be construed not only by having regard to the words appearing therein but also with regard to the surrounding circumstances.

What then were the surrounding circumstances?

The assignment was an absolute assignment of the sub-contract; not just an assignment of all monies due and payable to Aluminex under the sub-contract for the design, supply and installation of curtain walling and frameless glazed screens. But, clearly, the sub-contract for the design, supply and installation of glass curtain walling and frameless glazed screen involved two elements; namely, the price of the glass and the value of the work to be done. The glass was therefore merely installed by Aluminex in accordance with the requirements of the sub-contract. If the facility letter dated 15 September 1986 from UMBC to Ming Sing is read together with the assignment and in our view, it can properly be so read, it being part of the surrounding circumstances, it is obvious that although the entire sub-contract sum was payable to UMBC, through the account opened by Aluminex with UMBC, yet, UMBC was to pay itself only 50% of the sub-contract sum (RM2.3 million or value of the glass) and then pay the surplus to Aluminex.

In these circumstances, it is difficult to see how it could be said that there was a manufacture of a new item or the mixing of goods wherein the new product was vested in Aluminex. We therefore fail to see how the case of *Clough Mill v. Martin* assists UAB.

Does the fact that UAB's debentures were prior in point of time and contained negative pledges against the creation of later prior ranking charges operate to defeat UMBC's claim to priority?

It is true that UAB's debentures were prior in point of time and they contained restrictions on Aluminex's power to create later prior ranking charges, save with the written consent of UAB, but clearly, that does not confer upon the debenture holders UAB and their Receivers, a charge over anything more than Aluminex itself had over the additional asset which was merely the right to acquire beneficial ownership to accompany the legal ownership of the glass upon payment of the full purchase price therefor. To put it another way,, you cannot pick out the benefit of an asset without also accepting the encumberance on it. [See *Rother Iron Works Ltd. v. Canterbury Precision Engineers Ltd.*, [1974] QB 1, *N.W. Robie & Co. Ltd. v. Whitney Warehouse Co. Ltd.* [1963] 1 WLR 1324 and *George Barker (Transport) Ltd. v. Eynon* [1974] 1 WLR 462]. Our answer to this question, therefore, is "No".

Did notice of the existence of UAB's prior registered debentures constitute notice to UMBC of their contents including the negative pledges?

It is also true, as Counsel for UAB has stressed, that when UMBC took the assignment and registered it as a charge with the Registry of Companies, Kuala Lumpur, pursuant to s. 108(3)(d) of the Companies Act, it was aware of the existence of the prior registered debenture and supplemental debenture held by UAB, but a wealth of English authority indicates that, contrary to ordinary conveyancing practice, notice of a debenture creating a floating charge does not constitute notice of the terms thereof including restrictive clauses forbidding the creation of later charges ranking in priority to or *pari passu* with the charge containing the clause. (See *English and Scottish Mercantile Investment Co. v. Brunton* [1892] 2 QB 700; *Re Castel and Brown Ltd.* [1898] 1 Ch 315; *Re Vallertort Sanitary Steam Laundry Co.* [1903] 2 Ch 654; *Wilson v. Kelland (ibid)* and *G & T Earle Ltd. v. Hemsworth RDC* [1928] 44, TLR 605).

We are mindful of the fact that when these cases were decided restrictive clauses of the kind we have referred to were rarely encountered, whereas nowadays, they are regularly encountered. However, in Malaysia, the procedure in force, at the material time, for registration of a debenture, did **not** require a record to be made of the particulars of a restrictive clause of the sort we have referred to. (Compare the Singapore Company Regulations 1987, which make provision for noting the restrictions or prohibitions on the Company in connection with the charge). Here, one was merely required to register certain particulars of a debenture or charge and one could do no more. More particularly, at the material time, the particulars required to be entered under the Malaysian Companies Act 1965, (see Companies Regulations 1966, Schedule 2, Form 34, prior to its amendment by P.U.(A) 16 which came into force only on 1 February 1986) were these:

(a) the name of the company giving the charge;
(b) the date of the creation of the charge;
(c) description of the instrument creating or evidencing the charge;
(d) the amount secured by the charge;
(e) short description of the property affected; and
(f) names and addresses of the persons entitled to the charge;

We are, therefore, of the view that the English authorities cited above on this point should be followed and we accordingly do so.

We have also considered the question whether UMBC had actual notice of the restrictive clause in the debenture and the supplemental debenture on Aluminex's power to create later prior ranking charges save with the written consent of UAB and are satisfied that, upon the evidence disclosed by the record provided, there is no such evidence. We need hardly add that the *onus* of proof as regards this point is upon UAB.

Conclusion

It follows that whilst it is true that the legal title in the glass passed to Aluminex upon delivery of the same pursuant to the Contract of Sale, Aluminex well knew and indeed had consented to the glass and the progress payment certificates being subject to the equitable charge created in favour of UMBC as evidenced by the assignment and the facility letter dated 15 October 1986. In other words, there was never any absolute sale of the glass to Aluminex who thus took the glass subject to the rights of UMBC, and all that Aluminex acquired was an interest in the equity of redemption.

Therefore, the debenture holder UAB being in the position of an equitable assignee cannot be in a better position than the assignor Aluminex. In this, we are supported by the following passage in the judgment of Harvey CJ in *Matheson v. Wahlen* [1928] SR (NSW) 189 at p. 194:

> It is quite true that the plaintiff's debenture is prior in time, and it expressly provides that no mortgage or charge is to be given by the company in priority to the charge thereby created; but it seems to me that that does not give the plaintiff a charge over anything more than the company itself at any time acquires, and if the company acquired property afterwards, not right out, but subject to a charge, and whether it was realty or personalty seems to me to make no difference, such charge seems to me must take priority over the plaintiff's debenture. The plaintiff cannot, by virtue of his charge, enlarge the property which comes into the company's hands.

We note that the case of *Matheson v. Wahlen* was followed in *Re Bunbury Foods Pty. Ltd.* [1984] 2 ACLC 639.

On a further ground also the appellant is entitled to succeed.

If, contrary to our primary view, the assignment did **not** give rise to an equitable charge in the glass in favour of UMBC as unpaid seller, having regard to the principles enunciated in *Wilson v. Kelland (ibid), Re Connolly Brothers Ltd. (No. 2) (ibid)* and *Security Trust Company Ltd. v. Royal Bank of Canada (ibid),* then, upon the evidence, we are satisfied that the assignment amounted to a subsequent fixed charge in respect of the book debts of Aluminex - that is, debts arising in the course of a trader's business which are of such a kind that it would ordinarily be entered in a trader's books or the modern equivalent of books e.g. computer records, whether in fact so entered or not (See *Shipley v. Marshall* [1863] 14 CB (NS) 566; *Independent Automatic Sales Ltd. v. Knowles Fosterd* [1962] 3 AER 27 - which takes priority over the floating charge of UAB since the floating charge had not crystallised at the date of the assignment and UMBC did not have express notice of the restrictive clauses in the debentures.

In the result, the appeal is allowed, the order of the learned Judge in the Court below on the issue of priority and his orders consequential thereto, are set aside and in lieu thereof, we substitute, a declaration that the appellant UMBC are entitled to priority over the first respondents UAB, that the sum of RM285,811.88 now held on fixed deposit with UMBC together with all interest which has accrued and continues to accrue therefrom, be paid out to UMBC forthwith, in repayment of the loan granted by UMBC to Ming Sing.

We need hardly, add, since it goes without saying, that Aluminex are entitled to the balance sum of RM290,283.20 due on 31 July 1988 under the sub-contract dated 18 April 1986 and this, together with all other sums as may have become due under the sub-contract (save and except the sum of RM285,811.88 aforesaid and interest which has accrued and continues to accrue therefrom), must be paid by the main contractors the second and the third defendants to the sub-contractor Aluminex.

Finally, the appellants must also have the costs of the proceedings both here and in the Court below and there must be an order for the refund to the appellants of the sum paid by way of deposit for security for costs of the appeal.